Techno Construction Corp. and Janco Contracting Corp. *and* Local Union 282, International Brotherhood of Teamsters, AFL–CIO. Cases 29–CA–20330, 29–CA–20332, 29–CA–20522, and 29–CA–20530

January 23, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

On June 20, 1997, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel, Respondents, and the Union filed exceptions and supporting brief. The Respondent and Union filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings, and conclusions,[2] as further explained below, and to adopt the recommended Order.

We agree with the judge that the Respondents[3] violated Section 8(a)(3) of the Act by temporarily laying off the four drivers. The judge found the layoff constituted an unlawful "defensive" lockout, i.e. that the Respondent locked out its drivers in anticipation of a strike or concerted work stoppage. We affirm the judge's finding of a violation, but do not rely on his characterization of the Respondents' action. In agreement with the General Counsel, we find that the Respondents temporarily laid off the four drivers in retaliation for their expression of desire for continued union representation.

In order to prove discrimination in violation of Section 8(a)(3) of the Act, the General Counsel must first persuade the Board that antiunion sentiment, or animus, was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See also *Manno Electric,* 321 NLRB 280 fn. 12 (1995).

The record shows that Respondent Techno's coowner, Joseph Mutino, conversed with each of the unit drivers about converting operations to nonunion status. At least three of them expressed the desire for continued representation by the Union and coverage by a union contract. Thereafter, the Respondents told the drivers to stay home on the following Monday, July 1. They were not recalled to work for two or three working days.

We find that the timing of the purported layoff, immediately following notice that most of the drivers desired continued union representation, warrants the inference that animus against such protected employee activity motivated Mutino's peremptory decision to take them off the ongoing job. This inference is reinforced by the pretextual nature of Respondents' attempts to explain Mutino's action. Respondents claim that he laid off the drivers in anticipation of an industry-wide strike, with attendant possibility of vandalism. We agree with the judge that "there . . . [was] no objective evidence to support this opinion of Mutino's." There is no evidence substantiating the possibility of vandalism. As to the possibility of a strike, the only evidence is Mutino's testimony about "rumors" and the testimony of employee Kish regarding the discussion several months before of the possibility of an industrywide strike in the event that negotiations for a multiemployer collective-bargaining agreement failed. We find that Mutino did not have any reasonable apprehension of a strike affecting the Respondents' operations when he told the drivers not to come to work on Monday. The pretextual nature of this defense became even more manifest when the drivers appeared on Tuesday at a jobsite unaffected by any strike action and were still not asked to return to work.

Under the circumstances, we think it is quite clear that Mutino reacted to the drivers' message of continued desire for union representation by sending a message of his own: no union or no work. Accordingly, we find that the Respondents violated Section 8(a)(3) and (1) by laying off the drivers in retaliation for their expression of continued support for the Union.[4]

[1] The Union has requested oral argument. The request is denied as the record and briefs adequately present the issues and positions of the parties.

[2] In adopting the judge's conclusion that the Respondent did not violate Sec. 8(a)(5) by withdrawing recognition from the Union, we specifically agree with his definition of "employees engaged . . . in the building and construction industry" under Sec. 8(f) of the Act and with his application of that definition to the facts of this case.

[3] We agree with the judge, for reasons set forth in his decision, that the Respondents are a single employer. We do not, however, rely on his finding that the unit drivers were always supervised by either Mario Leperuta and/or Sam Houston. The record nevertheless supports finding that a common group of supervisors from both companies supervised the drivers' work.

[4] Our dissenting colleague states that the Respondent lawfully laid off the employees based on their expressions of unwillingness to work on a nonunion basis. We disagree. The employees did not quit, and they did not insist on the Respondent's recognition of the Union as a condition for their continuing to work. There is no evidence that the Respondent viewed the employees' statements in the manner suggested

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Techno Construction Corp. and Janco Contracting Corp., Staten Island, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER HURTGEN, dissenting in part.

I agree with my colleagues and the judge that, based on its Section 8(f) relationship with Teamsters Local 282 (the Union), the Respondent did not violate Section 8(a)(5) by withdrawing recognition from the Union at the expiration of the 1996 collective-bargaining agreement. I also agree that the Respondent did not violate Section 8(a)(1) by informing employees of this intended withdrawal. Unlike the judge and the majority, however, I further find that the Respondent did not violate Section 8(a)(3) by briefly laying off its drivers immediately after the withdrawal of recognition. Rather, I find that the evidence fails to establish that this temporary layoff was discriminatorily motivated.

It is well settled that "to find a violation of [Section] 8(a)(3) the Board must find that the employer acted for a proscribed purpose." *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 311 (1965); *Best Plumbing Supply*, 310 NLRB 143 (1993). Phrased differently, "[u]nlawful motivation is a critical component of a prima facie case of discrimination under Section 8(a)(3)." *Raymond Engineering*, 286 NLRB 1210, 1221 (1987). Under *Wright Line*,[1] the General Counsel has the burden of establishing, as part of the prima facie case, that unlawful antiunion animus was a substantial or motivating factor in the challenged adverse action. See, e.g. *Allegheny Ludlum Corp*., 320 NLRB 484 (1995), enfd. in relevant part 104 F.3d 1354 (D.C. Cir. 1997). Here, I find that the General Counsel has not met this burden.

As my colleagues concede, the Respondent's June 28, 1996 discussion with its drivers was the catalyst that prompted the temporary layoff. Contrary to their position, however, I find nothing in that conversation which establishes the requisite unlawful motive. In that discussion, the Respondent informed its four drivers that it would no longer be affiliated with the Union and told them that it would try to provide them with comparable benefits. As found by the judge, and conceded by the majority, both these statements were lawful. Next, the Respondent informed the drivers that they could get together and form their own union, vote for Teamsters 282, or select any other labor organization. Certainly, this credited testimony is the antithesis of anti-union conduct. Finally, the Respondent inquired (again, lawfully), whether the drivers would be willing to continue working for it after the withdrawal of recognition. Most stated that they would not, explaining that they would not work without union representation. Following this announcement, the Respondent temporarily laid them off. In doing so, it made no statement or took no other action indicating that the layoff was in retaliation for their desire for continued union representation.

Based on this credited evidence, I find that the General Counsel failed to establish a prima facie case that the Respondent's layoff decision was discriminatorily motivated. In particular, I note that following its lawful and union-neutral comments in the June 28 discussion, the Respondent simply inquired whether its drivers would continue working for it. The question did not suggest or imply that the Respondent would not permit the employees to work. Rather, the question was whether *they* would be willing to work in view of the withdrawal of recognition. The employees said that they would not be willing to do so. In sum, Respondent's lawful condition of employment was that there would be no Union; the employees were unwilling to work under that condition. Faced with this, the Respondent lawfully laid them off.

My colleagues assert that the employees were laid off because they expressed a preference for the Union. However, Respondent made it clear to them that they were free to select the Union as their representative. Thus, the Respondent's act of layoff was not in retaliation for their support of the Union; Respondent had just reaffirmed that the employees could make that choice.

Further, even if the General Counsel established prima facie that antiunion animus was a reason for the layoff, Respondent would have laid them off in any event because Respondent feared a work stoppage. Contrary to my colleagues, I conclude that the evidence is sufficient to establish that the Respondent reasonably anticipated that its drivers might engage in a work stoppage in response to the withdrawal of recognition, or as part of an industry-wide strike.[2] As found by the judge, Respondent

by the dissent. Instead, as accurately summarized by the judge, Mutino testified "that he understood their responses as being ambiguous and indicating that there might be a general strike." We have found that the Respondent's reliance on the professed apprehension of a strike—the only reason offered by the Respondent for its layoff action—was pretextual.

[1] 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989 (1982).

[2] In my view, the majority misses the mark by arguing that the temporary layoff was unlawful because the employees neither quit their employment nor formally demanded recognition of the Union as a condition of continued employment. What is dispositive is that, as found by the judge, most employees made clear that they would not

> . . . told the employees that they should not come in on Monday because [it] anticipated that they might engage in a work stoppage, either in conjunction with a general strike by the Union *vis a vis* the industry, or because of [its] withdrawal of recognition.

The employees did not respond that no such work stoppage was planned. On the contrary, they told Respondent that they would *not* work because of the withdrawal of recognition. In addition, the Respondent previously had heard that, following the June 30 expiration of the contract there might be an industrywide strike.[3]

Accordingly, I find that the evidence does not establish that the layoff violated Section 8(a)(3) and I would dismiss the complaint.

April Wexler Esq., for the General Counsel.
Alexander A. Miuccio Esq., for the Respondents.
Russell Holland Esq. and *Peter Zwiebach Esq.,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Brooklyn, New York, on March 4, 5, and 6, 1997. The charges were filed on September 17, December 6, and December 10, 1996. A complaint based on these charges was initially issued on January 16, 1997 and a consolidated amended complaint was issued on February 27, 1997. In pertinent part, the amended complaint alleges as follows:

1. That the Respondents Techno and Janco, both New York corporations, are engaged in the construction industry and constitute a single employer.

2. That the Respondents have each executed a memorandum agreement dated November 9, 1993, pursuant to which they have each agreed to be bound by the terms of a collective-bargaining agreement between the Union and the General Contracting Association of New York (GCA), effective by its terms from July 1, 1993, through June 30, 1996.

3. That the appropriate bargaining unit of the collective Respondent is

> All full-time and regular part-time drivers, excluding guards and supervisors as defined in Section 2(11) of the Act.

4. That the Union is the 9(a) representative of the employees in the foregoing bargaining unit.

5. That on or about June 28, 1996, the Respondents, (a) promised employees medical benefits, guaranteed work, and 401(k) retirement benefits if they abandoned their membership in the Union; (b) told them that they would be laid off effective July 1, 1996; and (c) urged them to join another union.

6. That on June 28, 1996, the Respondents bypassed the Union and dealt directly with the employees.

7. That on June 30, 1996, the Respondents withdrew recognition from the Union.

8. That since June 30, 1996, the Respondents have failed to remit contributions to contract funds and have failed to apply differentials fees, travel time benefits, wages, and other terms set forth in the collective-bargaining agreement.

9. That on July 1, 1996, the Respondents for discriminatory reasons laid off employees Fred Shaaf, and Earl Eddy from July 1 to July 3, and laid off employees Thomas Kish and Richard Marotta from July 1 to July 8.

10. That in mid-August 1996, the Respondents threatened employees that they would sell their trucks and lay off their employees if they joined or supported the Union.

11. That in mid-August 1996, the Respondents interrogated their employees.

12. That on September 25, 1996, the Respondents interrogated employees concerning their testimony provided to the Board.

The Respondents assert that the contracts they had with the Union were prehire agreements under Section 8(f), which were repudiated effective July 1, 1996. In this regard, the Respondents argue that as their recognition was based on Section 8(f) of the Act, and not Section 9(a), they were free to repudiate the contract and withdraw recognition from the Union at the expiration of the contract term, irrespective of whether they had any doubt as to the Union's continuing majority status. Assuming that the Respondents are correct in this assertion, then the other alleged violations would be explained by the circumstances peculiar to this case.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondents are New York corporations engaged in the building of water and sewage systems. They admit and I find that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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work for the Respondent if it withdrew recognition from the Union. In those circumstances, I find that the Respondent lawfully laid them off.

Further, to the extent that there was any 'ambiguity' in the employees statements—as to whether they were signaling a general industry strike or more narrowly announcing their refusal to work for the Respondent after it withdrew recognition—the net effect was the same.

[3] I disagree with the majority's assertion that the judge found that there was no objective evidence to support either the Respondent's claims that it feared an industrywide work stoppage or that it anticipated that such stoppage would be accompanied by vandalism. At most, the judge found a lack of objective evidence as to the vandalism claim. To the extent that the judge's finding was broader, I disagree with it, for the reasons discussed above.

[1] The Respondent's unopposed motion to correct the Record is granted. In this regard, the transcript of March 5, 1997, misidentified Mr. Miuccio, the attorney for the Respondent, as Peter Zwiebach, the attorney for the Union.

II. ALLEGED UNFAIR LABOR PRACTICES

Techno Construction Corp. was formed in 1988 and is owned by Anthony Carpeniello and Joseph P. Mutino who each own 50 percent of its stock. It is engaged in the business of installing and repairing water and sewer pipes and mains. There is no question that it is engaged in the construction industry and that in performing its work, it employs construction employees such as laborers, carpenters, and operating engineers, all of whom are represented by their respective unions. Techno's principal customer is the New York City Department of Design and Construction.

Janco Contracting Corp. was formed around 1990. Its president and majority owner is Nigel Singh who owns 51 percent of the Company's stock. Carpeniello and Mutino each own 24-½ percent of Janco's stock and the directors of this company are Singh, his wife, and Mutino. Janco is certified as a minority contractor and because of that, apparently is able to have an edge in obtaining public contracts. Its business is essentially the same as Techno's and it uses many of the same supervisors. As in the case of Techno, there is no dispute that Janco is engaged in the construction industry and that it employs construction workers who are represented by construction unions. Many of Janco's jobs have been done for the Port Authority. In terms of volume, Janco is much smaller than Techno.

While Techno and Janco may bid for and receive their own contracts, it is agreed that from time to time they will also work as joint venturers. Thus, during the last 4 to 5 years, at least four jobs were done by Techno and Janco as joint venturers under the name of Techno Contractors.

In relation to the performance of their work, both Techno and Janco use truckdrivers. In this regard, Techno employs four men who are drivers and when Janco needs drivers, it will normally lease them and the trucks from Techno. (Janco neither directly employs truckdrivers nor owns trucks.) The four employees in question are Fred Shaaf, Richard Marotta, Earl Eddy, and Thomas Kish. Whether they work on a Techno job, a Janco job, or a joint venture job, the drivers would be supervised by Mario Leperuta and/or Sam Houston. The General Counsel contends, and I agree, that given these circumstances, Techno and Janco constitute a single employer vis-a-vis the employment of these truckdrivers. *Pathology Institute*, 320 NLRB 1050 (1996).

The uncontradicted testimony of Mutino was that Techno initially recognized the Charging Party in late December 1990, or early January 1991, by signing an agreement before hiring any drivers. Mutino testified that he signed this agreement because Techno had obtained a contract to perform certain work at Fulton Street which required the company to have collective-bargaining agreements with all the local unions representing the categories of employees that it would have working at the jobsite. In this regard, what Techno signed was an agreement to bound by the collective-bargaining agreement that had been negotiated between Teamsters Local 282 and the General Contractors Association (GCA) and which ran from 1990 to 1993. (This agreement is entitled the "New York City Heavy Construction and Excavating Contract"). When Techno began to utilize people to drive trucks, (sometime in March or April of 1991), these people were paid wages and benefits in accordance with the Local 282/GCA collective-bargaining agreement. And when that contract expired, Techno agreed to be bound to the succeeding agreement that ran until June 30, 1996.[2] Although it is not entirely clear as to timing, the record indicates that Janco also signed an identical agreement.

On April 26, 1996, Techno and Janco sent letters to the Union stating:

> Upon expiration of the existing collective-bargaining agreement on June 30, 1996, we will repudiate our pre-hire collective-bargaining relationship with Local Union No. 282 and, further, withdraw recognition from the union as their representative of our bargaining unit employees.

As noted above, there is a dispute as to whether the collective-bargaining relationship between the Union and the Respondents was initiated and maintained in accordance with Section 8(g) or Section 9(a) of the Act. It is my opinion that this relationship will be determined by the kind of work the truck drivers have done during their employment and *not* by what the parties intended back in 1990 and 1991. (I doubt that either party, and certainly not the employer, had these statutory provisions in mind when Techno recognized the Union).

When asked what work he did, Earl Eddy, with admirable succinctness, testified, "I drive a truck." Nevertheless, the question here is where does he and the other drivers, drive their trucks. (Or hang out when they are not actually driving). Clearly all their driving is connected to the construction work that is being undertaken. But some of their driving is done to bring materials to and from the locus of where the construction work is being done, while at other times their driving is done directly on the jobsite itself.

A typical type of job would be to remove old pipes and to install new water pipes and sewer pipes to a particular street or groups of streets. In this circumstance, the jobsite would consist of the streets where the work was being done and it would sort of move along as work went from one end to the other. Depending on the size of the job, the company's vehicles or machinery (such as backhoes, bulldozers, etc.) would be parked near the trenches or nearby on adjacent streets or on a nearby vacant lot if available. On some jobs, the trucks might be parked on the jobsite. In other cases, trucks are kept at Techno's yard where they are driven to the jobsite each day.

To accomplish a job as described above, a trench is dug using heavy equipment, (such as backhoes), operated by operating engineers. If old pipe is there, it is removed and transported away from the site. Crushed stone is put into the trench, whose sides have been shored up by carpenters. After this, new pipe is placed into the trench and connected. When pipe is placed in one end of a trench, it is covered by dirt, much of which had been excavated when the trench was first dug, and this portion

[2] The Local 282 agreements with the GCA that were applied to the Respondents did not contain hiring halls and did contain 30-day union-security clauses. In addition, the agreements required employers on projects of a certain size to employ "on site shop stewards" whose function, according to Business Agent Lawrence Kudler, would be to handle grievances of truckdrivers employed by the company. As the Respondents have never worked on jobs which met the triggering size, they have never employed an "on site steward."

of the trench would then be covered by asphalt. As the work proceeds down the street or streets, there is a continual process of excavation, trench making, pipe installation, and trench covering.

In a pretrial affidavit Thomas Kish, one of the truckdrivers, described his typical work day as follows:

> My typical workday driving a dump truck is this—In the morning I would go to Techno's yard and pick up the truck and then go to the nearest jobsite where we were working. I would be loaded by an excavator, operated by an operating engineer on site. Then I would, if it was asphalt, bring it to Staten Island landfill. Most dirt and fill would be used for back fill and we stockpile it on the jobsite. They put pipe in the ground and they dig out the dirt for that piping. I would dump that dirt that they dug up the day before at another location on the site for back fill. So for example, you would take an empty dump truck to one part of the site, where an operating engineer with an excavator would load the dump truck with fill dirt, and then I would drive it over to another part of the jobsite and dump it where it was needed for fill. There was no other job I performed on the jobsite besides moving fill. Sometimes we take the unwanted fill or broken concrete and bring it to the land fill outside the jobsite. At times we would pick up stone or paving at the nearest facility and then we'd bring this material to the jobsite on our dump truck or on a dump trailer. This is a tractor and a trailer connected, its a trailer with a dump body. I work an 8 to 9 hour day, and sometimes we spend all day on the job, they don't send you away. Sometimes they can put 100 to 200 feet of pipe in the ground so they have trucks line up so they load one and he'll go dump on the jobsite around the block, and they'll load another truck and he'll go and dump in the site, its a big circle. If all our trucks are working, the employer needs more trucks, he'll hire outside trucks and send them to dump at other sites.

Each side's witnesses gave estimates as to what percentage of the time the truck drivers spent at a jobsite as opposed to being away from a construction site. Frankly it was my opinion that the testimony of both sides regarding these estimates was not particularly reliable as there had been no prior need to quantify this issue. The General Counsel's witnesses testified that they spent a majority of their time away from the jobsite, while the company's witness testified that the drivers spent a majority of their time on the jobsites.

Based on the testimony from all witnesses, it seems that the percentage of time that any of the truckdrivers spends at a construction site will depend on the type of work being done, the type of truck to which he is assigned, and what has to be done on any given day.

The company uses three types of trucks that are operated by the four people involved in this case. It has two dump trucks, one tractor dump truck, and one boom truck. The dump trucks are 10 wheeled trucks and look like what they are called.

The tractor truck consists of a tractor and a separate container, which holds more stuff than can be held by a dump truck. Earl Eddy, who is number one in seniority, is normally assigned to drive the tractor-trailer. Everyone agrees that the tractor-trailer is mainly used to take materials to and from jobsites and will not ordinarily be operated on a site. Accordingly, for the most part, Eddy does not drive on a construction site.

The boom truck is a vehicle with a hydraulic arm having a hook and which is used to move materials such as steel plates etc. around a jobsite as needed. In this regard, driver Kish testified that the boom truck is used on a jobsite to unload and load things such as pipe, fittings, steel rebar, steel plates, the small roller, and other small equipment. The boom truck is operated by one of the teamster truckdrivers and not by an operating engineer. In my opinion, when operated on a jobsite by one of the teamster drivers, that person is engaged in on-site construction work.

In my opinion, the record shows that although the dump trucks can and are used to carry materials such as sand, asphalt, steel plates, and stone to and away from jobsites, a substantial and perhaps a majority of their time is used to move dirt from the trench being excavated to a pile on the jobsite and back to the trench when it is ready to be closed. Thus, Mutino's testimony regarding this subject was not really much different from the employees who used these dump trucks and conceded that they spent a lot of their time at the jobsites. Mr. Kish's testimony was that if he drove the tractor-trailer most of his time was spent away from the jobsite. Nevertheless he also testified that; "If I'm driving a ten wheel dump truck, I would normally spend most of the entire day on the job, dumping from the site of the excavation to wherever on the job we have a stockpile, unless they instruct me to go off the job and get a load of stone or a load of asphalt or something."

There is no dispute that on Friday, June 28, 1996, Mutino spoke separately to the four drivers and told them that the company was no longer going to be affiliated with the Union.

Fred Shaaf testified that he was told that the company was going to stop being in the union but that the employees would keep the same benefits. Shaaf testified that he was asked if he would continue to work and that he responded that he would rather be laid off than work without a union.

Earl Eddy testified that he didn't recall much of what was said at the June 28 meeting. To the extent that he recalled the event, he testified that the employer said that they were going to repudiate the contract with the Union and that there was some talk about the men forming their own union. Eddy said that there was a mention of the men getting benefits without having a union contract and that there was some confusing discussion about "core" membership. Eddy testified that he did not tell the employer that he would not work if there was no union contract.

Mr. Kish testified that Mutino told him that the company was no longer going to be affiliated with Local 282 and that he was asked if he would continue to work for them. He states that he responded that he would not under those conditions. According to Kish, he asked if there were any options and Mutino said that the company hadn't really looked into anything but that it would in the future. Kish stated that insurance and a 401(k) plan was mentioned as a possibility for future exploration but that no specific promises were made to him. Kish further testified that there was no discussion about a possible strike, although his testimony clearly indicates that he told Mutino that

he would not be willing to work if the Company disaffiliated from Local 282.

Mutino's version of the June 28 conversations is not much different from the version given by the employees.[3] Mutino states that he told them that under NLRB rules and regulations, the company was no longer required to recognize the Union and that the law permitted the company to give the employees a comparable package of wages and benefits. Mutino states that he told them that there were a lot of options and if they couldn't continue to be covered by the Union's medical plan, the company would put them into the plan that covered the Company's office workers. Mutino states that he told the employees that he was not an expert and would try to research what the Company could legally do to protect the men. According to Mutino, he mentioned something about financial core membership, but it is evident from his testimony and the testimony of the employees that he really didn't know what he was talking about and this reference confused everyone. Mutino agrees that he told the drivers that they could get together and form their own union. Mutino states that he also told the employees that they could vote for Local 282 or any other union. According to Mutino, the men were very confused and concerned about their employment and benefits and he asked them if they were coming to work. He testified that Fred Shaaf said that he wanted to take a week off but that the other drivers said that they didn't know what they were going to do and that there probably was going to be an industry-wide strike on Monday.

At some point during, or immediately following these interviews, the 4 drivers were told not to come in on Monday, July 1, 1996, and they did not. In this regard, Mutino testified that because the next week had the holiday anyway and because he thought that there might be the possibility of a general strike by Local 282, he told the drivers to stay home on Monday and that they would see what was going on. According to Mutino he anticipated that if there was a general strike by the Union, there might be some vandalism. There is, however, no objective evidence to support this opinion of Mutino's.

The drivers visited the Willowbrook jobsite on Tuesday, July 2, but were not asked to return to work.

On Wednesday, July 3, two of the drivers, Shaaf and Eddy, were recalled to work. As July 4 fell on Thursday, no one worked on July 4 and 5. Kish and Marotta were called back to work on Monday, July 8, 1996.

There is no dispute that as of July 1, 1996, the Company has failed to comply with the terms and conditions of the expired collective-bargaining agreement and has not, inter alia, remitted any moneys into the Pension and Welfare Funds. There is also no dispute that the company has unilaterally changed the conditions of employment for the drivers (as represented in the prior collective-bargaining agreement), without affording the Union an opportunity to bargain.

Kish also testified to a conversation he had with Carpeniello in mid-August 1996. In this regard, he stated that Carpeniello asked if he was looking for work elsewhere to which Kish replied no.

Kish finally testified that in late September 1996, Mutino asked him if he thought that the Company was threatening him. When Kish asked Mutino what made him say this, Mutino responded to the effect that the Union had brought legal proceedings against the Company and that he, (Mutino), thought that Kish was the only employee who would say anything like that. Kish states that he told Mutino that he never claimed that the Company had threatened his job and that he liked his job and wanted to keep it.

III. ANALYSIS

(a) The withdrawal of recognition

Section 8(f) of the Act reads as follows:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical are: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

The employers take the position that they are engaged in the construction industry, that the employees in the bargaining unit are engaged in construction industry work, and that pursuant to *John Deklewa & Sons* 282 NLRB 1375, enfd. sub nom. *Iron Workers Local 3 v. NLRB,* 843 F.2d 770 (3d Cir. 1988), the employers were free, after the last contract expired, to withdraw recognition from the Union. Obviously, if the employers could repudiate the agreement and withdraw recognition, they could also unilaterally refuse to continue the terms and conditions set forth in the expired contracts.

In *John Deklewa & Sons*, supra, the Board held that prehire collective-bargaining agreements in the building and construction industry, entered into pursuant to Section 8(f) of the Act, will be enforceable through the refusal to bargain provisions of

[3] Marotta did not testify about his conversation with Mutino on June 28, as it was represented that his testimony would be essentially the same as the others and his testimony in this regard was cumulative.

the NLRA at Section 8(a)(5) and 8(b)(3), unless the employees vote, in a Board-conducted election, to reject or change their bargaining representative.

> Taken together, the four basic principles we advance today provide an overall framework for the interpretation and application of Section 8(f), which will enable parties to 8(f) agreements and employees to know their respective rights, privileges and obligations at all stages in their relationship. When parties enter into an 8(f) agreement, they will be required, by virtue of Section 8(a)(5) and Section 8(b)(3), to comply with that agreement unless the employees vote, in a Board-conducted election, to reject (decertify) or change their bargaining representative. Neither employers nor unions who are party to 8(f) agreements will be free unilaterally to repudiate such agreements. During its term, an 8(f) contract will not act as bar to petitions pursuant to Section 9(c) or (e). In determining the appropriate unit for election purposes the Board will no longer distinguish between "permanent and stable" and "project by project" work forces and singe employer units will normally be appropriate.

In *John Deklewa & Sons*, supra, the Board also held that the party asserting that a contract between a union and a construction industry employer covering construction workers is a 9(a) agreement has the burden of proof. See also *J & R Tile*, 291 NLRB 1034, 1036 (1988), where the Board noted, in a case involving a construction industry employer, that it "will require positive evidence that the union sought and the employer extended recognition to a union as the 9(a) representative of its employees before concluding that the relationship between the parties is 9(a) and not 8(f)." In *J & R Tile*, the Board specifically distinguished the facts from those in *Island Construction Co*., 135 NLRB 13 (1962), where it was clear that the union demanded and received recognition as the 9(a) representative.

Central to the Employers' case is the assertion that the contracts it had with the Union were made pursuant to Section 8(f) of the Act and were never converted to a 9(a) relationship by any subsequent demonstration of majority status and agreement by the employers. In support of its position that recognition of the Union was initially granted by virtue of Section 8(f), the employers asserts that no drivers had been hired at the time that the first contract was signed. The Respondent's main witness, Joseph Mutino, testified that the initial recognition which is evidenced by the labor agreement, *which is not dated*, was signed by him either in December 1990, or in January 1991. In either case, he testified that the Respondents did not, at that time, employ any truckdrivers; the first being hired in February 1991. Although the Union made an offer of proof during the course of the hearing, that offer would not have contradicted the testimony of Mutino regarding the initial recognition.[4]

The General Counsel contends that even if the original recognition was granted at a time when the Respondents did not employ any bargaining unit employees, the work done by the drivers is not construction work and therefore the bargaining relationship would fall within the ambit of Section 9(a) and not Section 8(f) of the Act. In this regard, she argues that even if the original recognition was made at a time when the Respondents did not employ any bargaining unit employees, and therefore would have violated Section 8(a)(2) at that time, (as a prehire agreement), the fact is that as no 8(a)(2) charge was filed within 6 months of the granting of recognition, it can no longer be challenged at the present time. See *Gibbs & Cox, Inc.*, 280 NLRB 953, 967 fn. 21 (1986); *International Hod Carriers (Roman Stone Construction)*, 153 NLRB 659 (1965).

There is and can be no dispute that the Respondents are primarily engaged in the construction industry as general contractors. In *Teamsters Local 83,* 243 NLRB 328, 331 (1979), the Board, in finding a particular group of employers to be outside the construction industry, stated:

> Thus the Board has found that Section 8(f) applies to employers who provide both labor and materials for construction without regard to whether the greater amount of revenue comes from the labor or from the materials. The exemption has also been applied to employers whose general business is not in the industry, but who are engaged in construction work on a specific project. In addition, Section 8(f) has been applied to companies engaged in the general contracting business which involves employees working and performing services at construction sites, such as sheet metal contractors. However, the 8(f) exemption has been denied to employers whose business involves the manufacture of construction materials which are installed by employees of a different employer and to employers who have only a minimal involvement in the construction process. [Citations omitted.]

Notwithstanding the fact that the Respondents are employers engaged in the construction industry, if the collective-bargaining agreements do not cover employees who are engaged in, or who, upon their employment, will be engaged in the building and construction industry, then the successive contracts between the Respondents and the Union would fall outside the scope of Section 8(f) and would therefore be 9(a) agreements, which even if unlawfully made at the time of initial execution, could no longer be attacked at the present time. Under such a circumstance, the Union would enjoy a presumption of majority status and the Respondents, at the expiration of the contract, could only withdraw recognition on showing an objective basis for doubting the Union's majority status, or proof that the Union did not in fact represent a majority of the

[4] At most, the Union's offer of proof would only establish that a copy of an agreement executed by the employer was received in the Union's office on March 15, 1991. Thus, the offer of proof, even if it might tend to establish that a union representative executed the agreement on or after March 15, 1991, would show only that the employer, *at some point before March 15, 1991*, executed a document which, in effect constituted an agreement to recognize the Union. There is nothing in the Union's offer of proof, and it can offer no witness, who can contradict Mr. Mutino's assertion that he recognized the Union in December 1990 or January 1991, before any unit employees were hired. Moreover, even assuming arguendo that the Respondents did recognize the Union at some point after it had hired truckdrivers, there is nothing in the Union's offer of proof which would show that the granting of recognition was in any way based on the Union having demonstrated its majority support to the Respondents or that the Respondents had granted recognition based on the Union's asserted majority status.

bargaining unit employees. *Laidlaw Waste Systems, Inc.*, 307 NLRB 1211 (1992). In the present case, the Respondents offered no evidence that they had any such objective basis for doubting the Union's majority status and their entire defense on this point is that they are entitled to withdraw recognition on the basis of *John Deklewa & Son,* supra.

On the other hand, if the employees involved herein are engaged in construction work, then the burden of proof would fall on the Union to demonstrate that the collective-bargaining relationship was initiated as a 9(a) relationship *or* that it was thereafter converted from an 8(f) to a 9(a) relationship. *John Deklewa & Sons,* supra.[5] Assuming for arguments sake that these employees are, in fact, engaged in construction work, the Union has not come close to sustaining this burden of proof.

There is no real dispute that on occasion, the drivers perform onsite driving and at other times perform offsite driving. In the case of offsite driving, it could be argued that such work should not be construed as construction work within the meaning of Section 8(f). How much time the drivers expend in either type of activity is in dispute.

Deciding whether or not a particular employee or group of employees is engaged in construction work may come up in the context of two separate provisions of the statute. (Sec. 8(e) and Sec. 9(f)). As noted below, these provisions were enacted for differing reasons.

There are a group of cases involving the construction industry proviso to Section 8(e) which is typified by a case such as *Teamsters Local 282 (Allco Concrete Products),* 234 NLRB 770 (1978). In that case, the union was charged with violating the hot cargo provisions of the Act set forth in Section 8(e). (This prohibits a union and an employer from agreeing in advance to a secondary boycott whereby the employer agrees not to do business with any person with whom the Union has a primary dispute.) The union defended on the grounds that its agreement fell within the construction industry proviso to Section 8(e) because the agreement sought only to bar from the construction site, employees of employers who were doing onsite work. The administrative law judge rejected this defense and held that the proviso to Section 8(e) would not apply to truckdrivers who only were making deliveries to or from a construction site. In reaching this conclusion the administrative law judge relied on *Teamsters Local 982 (J.K. Barker Trucking),* 181 NLRB 515, 517–518 (1970), enfd. 450 F.2d 1322 (D.C. Cir. 1971); *Teamsters (Island Dock Lumber)*, 145 NLRB 484 (1963), enfd. 342 F.2d 18 (2d Cir. 1965); and *Teamsters Local 294 IBT (Rexford Sand & Gravel),* 195 NLRB 378 (1972). (The cited cases all involved the question of whether the Union's actions in seeking to enforce agreements were protected by the construction industry proviso to Section 8(e) of the Act and none involved the question of whether a collective-bargaining relationship was pursuant to Section 9(a) or 8(f) of the Act).[6] The administrative law judge noted:

> The Board has held the delivery by a contractor of ready-mixed concrete to a construction site to be merely a delivery of work performed offsite rather than onsite and not within the protection of the proviso to Section 8(e). Similarly the unloading of sand at several locations on a construction site was found to be merely a delivery of materials and not work at the site of construction exempted by the proviso to Section 8(e).[7]

The number of cases specifically defining construction work within the context of Section 8(f) are quite limited.

In *J.P. Sturrus Corp.*, 288 NLRB 668 (1988), the employer operated a quarry, batch plant, and delivery service for ready-mixed concrete. One of the issues was whether the company was a successor to a company having a contract with the Union and whether it could either refuse to recognize or withdraw recognition from the Union. The company argued, inter alia, that it was an employer engaged in the construction industry and therefore was free to withdraw recognition under *DeKlewa & Sons*, supra. The Board agreed with the administrative law judge's conclusion that the employer was not in the building and construction industry within the meaning of Section 8(f). It stated:

> [W]e note that its drivers occasionally, and at their own discretion, assist the contractor at the construction site with screening and spreading of concrete, after they have poured it, when the contractor's own employees are unavailable. The drivers are not required or asked to perform these functions by the Respondent or the contractor; nor were they asked to do so by Wheeler, the Respondent' predecessor. Rather, the drivers offer their assistance on occasion in order to finish the job faster so that they can move on to their next assignment. The drivers also regularly hose the contractor's tools as part of their cleanup. We find that these incidental tasks do not bring the Respondent within the building and construction industry as contemplated by Section 8(f) of the Act.

[5] In *Goodless Electric*, 321 NLRB 64 (1996), recognition initially granted via Sec. 8(f) was subsequently converted to a 9(a) relationship when the employer agreed to recognize the union as a 9(a) representative based on a majority showing of authorization cards. In this case the Board held that because of the conversion, the employer could not withdraw recognition after the contract expired without objective evidence that it doubted the union's presumption of continuing majority status.

[6] It should be noted that the legislative motive for creating 8(f) and the construction industry proviso to Sec. 8(e) are completely different. In connection with the 8(e) proviso, the purpose was to prevent potential labor strife between union and nonunion workers at a construction site. *Joint Council of Teamsters Local 42*, 248 NLRB 808, 815 (1980). As to 8(f), the legislative purpose was to allow construction unions to represent workers who in this particular industry tend to work on a project-by-project basis for limited or short periods of time and where representation elections, in a large segment of the industry, would not be feasible. *Operating Engineers Pension Trust v. Beck Engineering & Surveying Co*., 746 F.2d 557 (9th Cir. 1984).

[7] *Joint Council of Teamsters Local 42*, 248 NLRB 808 (1980), *Joint Council of Teamsters Local 42* (*Inland Concrete Enterprises*), 225 NLRB 209 (1976), *Teamsters Local 282*, 197 NLRB 673, 675 (1972), and *Teamsters Local 294*, 195 NLRB 378, 381 (1972), are also cases involving the interpretation of the proviso to Sec. 8(e) with the conclusion that mere transportation of good or materials to or from a construction site is not onsite work and therefore not covered by the construction industry proviso.

In *St. John Trucking Inc*., 303 NLRB 723 (1991), the employer, who was engaged in the transportation of stone and sand to jobsites, contended that it was a construction industry employer entitled to withdraw recognition under *DeKlewa & Sons*. The Board rejected this contention, a conclusion that was not surprising given the past precedent regarding this type of employer and these types of employees. Nevertheless, the administrative law judge also noted, in support of his conclusion, that the agreement contained a 30-day union-security provision which is not typical of prehire agreements in the construction industry. The latter argument is not particularly relevant in my opinion as it is certainly possible that a construction industry contract may contain either a 7-day or 30-day union-security clause as agreed to by the parties. The fact that such an 8(f) agreement may legally contain a 7-day union-security clause does not mean that all construction industry labor contracts will necessarily contain such provisions or that agreements not containing such a clause are, a fortioriari, not 8(f) agreements.

In *U.S. Abatement Inc*., 303 NLRB 451 (1991), the administrative law judge concluded that the employer which was engaged in the business of asbestos abatement was an employer engaged in the construction industry within the meaning of Section 8(f) of the Act. He stated:

> It is evident that the asbestos removal activities in which Respondent is engaged affect the structure of buildings and equipment, such as boilers and pipes, which after installation, have become an integral part of the structure itself. Asbestos removal involves the alteration and repair of buildings and permanently attached fixtures and equipment. It is readily distinguishable from building maintenance and removal of waste . . . . Logically, it follows that the removal of one type of insulation, for which anther type of insulation is to be substituted, is a necessary part of the overall insulation installation or reinsulation process. One essential part of the process is just as much a part of the construction industry as is the other. For purposes of the definition of the building and construction industry, as used in Section 8(f), removal and substitution are but two halves of the whole.

The Respondent cited in support of its position *Operating Engineers Pension Trust v. Beck Engineering & Surveying Co*., 746 F.2d 557 (9th Cir. 1984). This case, which did not proceed before the National Labor Relations Board, was an action by the union's Pension Trust Fund to recover contractually required payments. The case was brought under Section 301 of the Labor Management Relations Act (LMRA) and Section 502(a)(3) of the Employee Retirement Income Security Act (ERISA). The employer contended inter alia that its contract with the union was made under Section 8(f) of the National Labor Relations Act (NLRA); that the employee for whom benefits were sought spent a substantial portion of his time doing construction work; and that accordingly it was permitted to disavow the contract at any time prior to the union's attainment of majority status. The company was engaged in civil engineering and surveying and the individual involved, (Gary Giesseman), was employed as an office manager and secretary. Nevertheless, there apparently was no dispute that in addition to his office duties, Giesseman also did surveying work in the field. Thus, in this case, we had a situation, where an employee spent part of his time doing "construction" work and part of his time doing nonconstruction work. In concluding that the labor contract was an 8(f) agreement, the court stated:

> By its terms, Section 8(f) imposes three prerequisites on a pre-hire agreement in order to bring the agreement within its coverage: (1) it must cover employees who are engaged in the building and construction industry; (2) the agreement must be with a labor organization of which building and construction employees are members; and (3) the agreement must be with an employer engaged primarily in the building and construction industry.
>
> . . . . .
>
> In adopting Section 8(f), Congress recognized that the representation procedures prescribed in Section 9 of the Act were largely unsuited to the peculiar circumstances of the construction industry, where employers ordinarily hire on a project-by-project basis. In such a situation, "representation elections in a large segment of the industry are not feasible to demonstrate such majority status due to the short periods of actual employment by specific employers. Instead, Congress acknowledged that pre-hire agreements were appropriate in an industry where an employer who might employ no one unless he is working on a project, must nevertheless know his anticipated labor costs before making a bid and must have access to a readily available pool of skilled craftsmen . . . ."
>
> We believe that the statutory requirement is satisfied if a substantial part of an employee's work is in the building and construction industry. We note that in defining the class of employers qualified to enter Section 8(f) agreements, Congress emphasized that it is not enough that an employer be merely one who is engaged in construction. Instead, the employer must be "engaged primarily in the building and construction industry."
>
> . . . .
>
> No such limitation is placed on the definition of employees who may be covered by a Section 8(f) pre-hire agreement. All that is required that they be "engaged (or . . . upon their employment, will be engaged) in the building and construction industry." As noted above, counsel have not cited to us any cases in which the inquiry focused on the degree to which the employee's work, as opposed to the employer's business, was construction related.
>
> We believe that the congressional purpose, which was to balance the Act's policy disfavoring recognition of minority unions against the specialized needs of the construction industry, would be satisfied by a requirement that a substantial part of the work performed by employees covered by a pre-hire agreement be in the building and construction industry.

In my opinion, the court's opinion in *Operating Engineers Pension Trust v. Beck Engineering & Surveying Co*., supra, is consistent with the statutory language of Section 8(f) and is not inconsistent with any Board case on the subject. And if the test for finding that an agreement is presumptively an 8(f) agree-

ment when the employees employed by a construction industry employer are *substantially* engaged in construction work, this means that the construction portion of their work must be more than minimal, but need not constitute a majority of their work. This seems to be the import of the court's decision and it is consistent with Board cases in other contexts where the word "substantial" means less than a majority. See for example, *Harte & Co*., 278 NLRB 947 (1986), where the Board held that in a relocation case, the employer would be bound to honor the existing contract if a substantial number of its employees were employed at the new location at a time when it became substantially operative. (In that case the number was 40 percent.) See also *General Extrusion,* 121 NLRB 1165 (1958), where in an expanding unit situation the Board held that a contract would constitute a contract bar if a substantial number of employees had been hired (at least 30 percent), and a majority of the job classification had been created.

It is my opinion that (a) the employers herein are primarily engaged in the construction industry and (b) that the employees covered by the agreements are substantially engaged in doing construction work (onsite truck driving). Therefore, I conclude that the agreements have, at all times relevant, been made pursuant to Section 8(f) of the Act. As there has been no showing that the initial recognition was made in accordance with a majority claim and as there is no evidence to show that the 8(f) relationship was at any subsequent time converted to a 9(a) relationship, I conclude that the employers were free to repudiate the collective-bargaining relationship on the expiration of the labor contracts. Accordingly, I shall recommend that the 8(a)(5) allegations be dismissed.[8]

(b) The other allegations

The General Counsel contends that the Respondents violated Section 8(a)(1) of the Act by various statements made to the employees on June 28, 1996. She accuses the Respondents of making illegal promises and with direct dealing and bypassing of the Union. She also asserts that the Company laid off the four employees effective on July 1, 1996, albeit for only 2 or 3 days.

If the Respondents had the right to repudiate the contracts and the collective-bargaining relationship, they had the right to tell the employees that this was what they were going to do. And if they had the right to terminate the bargaining relationship along with the old contract, I see nothing unusual or illegal in assuring the employees that the Respondents would attempt to maintain the status quo, by giving them benefits equivalent to what they had been receiving under the collective-bargaining agreement. Clearly such statements cannot be construed as bypassing the Union if the employers had the right to withdraw recognition and the Union no longer was the employees' bargaining representative. Nor, under these peculiar circumstances can the statements be construed as illegal promises of benefits as the Union had not filed a petition for an election and was not engaged in any campaign to organize the employees. Finally, as I credit Mutino's statement that he told employees that they had the option of voting for Local 282 or any other union, I shall not sustain the allegation of the complaint that he illegally urged employees to form another union.

Under the circumstances of this case, I also cannot say that the Respondents cannot ask the employees if they would be willing to work if the Company withdrew recognition, if the withdrawal of recognition was itself legal. Such a question would clearly be justified by normal business considerations as the Respondents are entitled to know if the employees would refuse to work if they disaffiliated from the Union.

There still remains the question as to whether the temporary layoff of the four drivers constituted a violation of Section 8(a)(3) of the Act. In this regard, the General Counsel's theory is that if the Respondents illegally withdrew recognition and illegally failed to continue the terms of the expired agreement, then even if one construed the employees' June 28 statements as constituting "quits," they should nevertheless be construed as being constructively discharged in violation of the Act. In *Goodless Electric Co*., 321 NLRB 64 (1996), the Board noted that employees "who quit work as a consequence of an employer's unlawful withdrawal of recognition . . . and unilateral implementation of changes in their terms and conditions of employment have been constructively discharged in violation of Section 8(a)(3) and (1)."

The above theory can't work if the withdrawal of recognition was legal and if the unilateral implementation of new terms and conditions was also legal. Nevertheless, it seems to me that the statements made on June 28 by some, but not all of the employees, to the effect that they would not be willing to work without union representation, were not intended and were not understood by Mutino as meaning that the employees were quitting their employment. Indeed, Mutino's testimony was that he understood their responses as being ambiguous and indicating that there might be a general strike on Monday, July 1. Thus, from his perspective, it seems that Mutino told the employees that they should not come in on Monday because he anticipated that they might engage in a work stoppage, either in conjunction with a general strike by the Union vis-a-vis the industry, or because of his withdrawal of recognition.

Interestingly, there is a line of old cases such as *American Brake Shoe Co*., 116 NLRB 820 (1956), vacated 244 F.2d 489 (7th Cir. 1957), where the Board held that it is a violation of Section 8(a)(3) for an employer to lock out its employees in anticipation of a strike to avoid the "ordinary" losses that are incidental to such a strike. The court disagreed with the Board's finding, but in subsequent cases, the Board reaffirmed this view. See *Hercules Powder Co*., 127 NLRB 333, vacated on other grounds 297 F.2d 424 (5th Cir. 1961), and *J.R. Simplot Co.* 145 NLRB 171 (1963), remanded 60 LRRM 2096 (9th Cir. 1965).[9] Of course, the practical consequence of these Board

[8] It should be noted that the Union, at any time after being recognized, could have sought to have the employer recognize it as the 9(a) representative by seeking an agreement based on a showing that the Union represented a majority of the drivers. If the employer had refused to recognize the Union on a voluntary basis, there was nothing to prevent the Union from obtaining authorization cards from these employees and filing a petition for an election with the Board under Sec. 9 of the Act.

[9] The Court remanded *J.R. Simplot* with instructions to reevaluate the Board's finding in light of the Supreme Court's decision in *Ameri-*

decisions was negated by the Supreme Court's decision in *American Ship Building v. NLRB* 380 U.S. 300 (l965), when the Court held that an employer may engage in an offensive lockout in order to press its proposals made in negotiations.

In the present case, I would analogize the "layoff" of the four drivers as being similar to a defensive lockout, equivalent to what was described in *American Brake Shoe Co.,* supra. That is, the employer sent the drivers home in anticipation of a strike or concerted work stoppage. However, as such a "lockout" could not have been in furtherance of the Respondents' bargaining position, because they no longer intended to bargain with the Union, the "lockout" cannot be described as a protected offensive lockout pursuant to *American Ship Building v. NLRB*, supra. If the decision in *American Brake Shoe Co.* retains any vitality in these unusual circumstances, I would conclude that the layoff of the four drivers therefore constituted a violation of Section 8(a)(3) of the Act.

The final allegations of the complaint concern conversations between Kish and Mutino in August 1996. These conversations are not, in my opinion, coercive and therefore do not violate Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By temporarily laying off employees Fred Shaaf, Earl Eddy, Thomas Kish, and Richard Marotta, the Respondents, Techno Construction Corp. and Janco Contracting Corp., violated Section 8(a)(1) and (3) of the act.

2. By the aforesaid conduct, the Respondents have engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. Except as set forth above, it is recommended that the other allegations of the complaint be dismissed.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondents having discriminatorily laid off employees, they must make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of lay off until the dates that they were recalled, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). As all of the employees herein were recalled shortly after the layoff, there is no need for a reinstatement order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondents, Techno Construction Corp. and Janco Contracting Corp., Staten Island, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off employees in anticipation of a strike or concerted work stoppage.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, make Fred Shaaf, Earl Eddy, Thomas Kish, and Richard Marotta whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs and notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at their facility in Staten Island, New York, copies of the attached notice marked "Appendix"[11] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the tendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed at any time since September 17, 1996.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

can Ship Building v. NLRB. A search through Shepard's did not indicate what the Board did with the case thereafter.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT lay off or otherwise discriminate against any of you for joining or supporting Local Union 282, International Brotherhood of Teamsters, AFL–CIO or because we anticipate a strike or concerted work stoppage, except as otherwise permitted under the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Fred Shaaf, Earl Eddy, Thomas Kish, and Richard Marotta whole for any loss of earnings and other benefits resulting from their layoffs, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of Fred Shaaf, Earl Eddy, Thomas Kish, and Richard Marotta and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that any such references will not be used against them in any way.

TECHNO CONSTRUCTION CORP. AND JANCO CON-TRACTING CORP.